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Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

**Re: Implementation of Section 103 of the STELA Reauthorization Act  
MB Docket No. 15-216**

Dear Ms. Dortch:

I hereby submit for filing in the above-referenced rulemaking proceeding the attached legal analysis of the scope of the Commission's authority to adopt rules furthering the statutory mandate that retransmission consent negotiations be conducted in good faith.

I would be happy to meet with Commission staff to discuss my views more fully.

Sincerely,

/s/ *James B. Speta*

Professor James B. Speta

cc: Office of Chairman Wheeler  
Office of Commissioner Clyburn  
Office of Commissioner Rosenworcel  
Office of Commissioner Pai  
Office of Commissioner O'Rielly  
William Lake  
Diana Sokolow

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 103 of the STELA Reauthorization Act of 2014	)	MB Docket No. 15-216
	)	
Totality of the Circumstances Test	)	

**REPLY COMMENTS OF PROFESSOR JAMES B. SPETA**

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January 14, 2016

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**Introduction and Summary**

1. Although this rulemaking is focused on the definition of “good faith” in retransmission consent negotiations, that issue is inextricably related to the nature of the Federal Communication Commission’s authority to order the parties to a retransmission consent negotiation to continue to negotiate and to order carriage in the absence of the parties’ having a current agreement in place – or to grant similar interim relief. The Commission has previously taken the position that it does not have the authority to order a broadcaster to permit its signal to be carried, even on an interim basis, absent a current retransmission consent agreement.<sup>1</sup> And several parties in this proceeding have taken the position that the FCC’s authority over retransmission consent negotiations extends only to “procedure” and not to “substance.”<sup>2</sup>

2. Based on my review of the FCC’s authority under the Communications Act generally and over broadcasters and cable companies specifically, I believe that the Commission has ample authority to order interim carriage as a remedy for a broadcaster’s violation of its

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<sup>1</sup> Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order, 15 FCC Rcd. 5445, 5471, ¶ 60 (2000); Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, 2727-28, ¶ 18 (2011).

<sup>2</sup> See *infra* ¶ 29.

statutory duty to negotiate in good faith. Similarly, I believe that the Commission has ample authority to enact rules that require retransmission consent agreements to include specific procedures that pertain to negotiation of renewal agreements, including such terms as cooling off and extension periods during which interim carriage might continue. Finally, I think any hard distinction between the substance and procedure of retransmission consent negotiations is unsupported by the statute; the Commission's authority extends to substance.

3. Nothing in section 325 of the Act, 47 U.S.C. § 325, changes my overall conclusions. Section 325 does grant the broadcaster the right to withhold consent for transmission of its signal. However, far from creating an absolute "property right" in the broadcaster's signal, section 325 puts several substantive and procedural limits on the broadcaster's ability to withhold consent. And section 325 itself recognizes the Commission's authority to enact rules (and adopt orders) enforcing those substantive and procedural limits. The limit on the FCC's authority is that broadcasters must ultimately be permitted to negotiate in good faith to impasse and then to withhold retransmission consent.

4. The reality is that section 325's provision that a broadcaster's signal cannot be transmitted without its consent does not stand on its own, but is part of a broader, highly reticulated regulatory scheme that attempts to address the myriad issues arising from Congress's desire to resolve significant copyright issues, maintain free over-the-air broadcasting, ensure that subscribers to cable and satellite television can receive broadcast signals, and to balance the need for reasonable prices with the use of quasi-market negotiations. In this broader context, it would be surprising indeed if the FCC did not have authority to significantly superintend retransmission consent negotiations.

5. In this setting, the legislative history's various statements are borne out: Congress hoped that negotiated solutions would generally resolve conflicts between broadcasters on the one hand and cable or satellite companies on the other. But Congress also believed that the FCC retained adequate authority to order carriage in situations in which the parties did not follow the statutory requirements of good faith negotiations.

6. In the balance of these comments, I begin by describing my background as well as the circumstance that have led me to form these opinions. Then, I describe each of the steps of my analysis more specifically.

### **I. Background**

7. I am a Professor of Law at Northwestern University Pritzker School of Law, and from 2013 to 2017, I am the Class of 1940 Research Professor of Law.<sup>3</sup> I am also the Senior Associate Dean of Academic Affairs and International Initiatives. I joined the Northwestern faculty in 1998.

8. My research area is telecommunications and Internet policy. In addition to writing generally on competition and market structure issues arising from technological change in communications markets, I have written extensively on the question of the Commission's statutory authority, particularly as it pertains to network neutrality and matters concerning Internet video. I am a co-author (with Stuart Benjamin) of the leading casebook *Telecommunications Law and Policy* (4<sup>th</sup> ed. 2015), which comprehensively covers the Communications Act, its regulated industries, and the administrative and judicial decisions governing those industries. I have published articles in the *Duke Law Journal*, the *Antitrust Law*

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<sup>3</sup> These comments are filed in my personal capacity and not as a representative of Northwestern University or its Pritzker School of Law.

*Journal*, the *Federal Communications Law Journal*, the *Yale Journal on Regulation*, and several other outlets. My complete curriculum vita is attached as Exhibit A to these comments.

9. I was initially contacted by Mediacom Communications to engage in an independent and confidential review of the question of the FCC's authority to order carriage under section 325. We agreed that I would be compensated for my work on that review, regardless of whether I reached a conclusion that agreed with Mediacom's prior submissions to the Commission on that question. Mediacom did not limit in any way the sources I could consider or the conclusions that I could reach. After I delivered my conclusions to Mediacom, we discussed my submitting those conclusions as comments in this rulemaking proceeding. Thus, while I have been compensated by Mediacom for my time, the conclusions that I have reached and now present in these comments are my own. I am the sole author of these comments, and I have not been asked to offer any particular conclusions or to revise my conclusions.

## **II. The FCC's Broad, General Authority in the Communications Act**

10. Although the theme is no doubt familiar, it bears starting with the proposition that the FCC has very broad authority over the broadcast and cable industries generally. It seems necessary to start here because, in its decisions under section 325, the FCC seems to have started from a different place – one that treats the broadcasters' right to withhold consent as a common law property right. For example, in the *Good Faith Order*, the Commission said that it “agree[d] with those commenters that assert that Section 325(b)(3)(C) should be narrowly construed. As commenters indicate, congressional language in derogation of the common law should be interpreted to implement the express directives of Congress and no further.” Implementation of the Satellite Home Viewer Improvement Act of 1999, *Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd. 5445, 5453 (2000). As I

will discuss further below, the characterization of section 325 as recognizing some common law property right seems to me incorrect. But, in all events, the basic proposition concerning the FCC's authority under the Act has always been one of breadth, not of a narrow derogation of the common law.

11. At the very beginning of the Act, Congress declared that it was creating the Commission “[f]or the purpose of regulating interstate communications by wire and radio.” 47 U.S.C. § 151. And Congress’s specific aim for the Commission was to use its authority “so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service.” *Id.* The Supreme Court found this provision powerful enough to justify the regulation of cable television at a time that nothing in the Act mentioned that specific service. “The Commission was expected to serve as the single Government agency with unified jurisdiction and regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio. It was for this purpose given broad authority. As this Court emphasized in an earlier case, the Act’s terms, purposes, and history all indicate that Congress ‘formulated a unified and comprehensive regulatory system for the [broadcasting] industry.’” *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968) (quoting *Pottsville Broadcasting*, 309 U.S. at 137; other internal quotations omitted). FCC action to ensure retransmission consent would certainly work “to make available” to “all the people of the United States” the broadcast communications service. 47 U.S.C. § 151.

12. The Commission has previously said that section 151 does not support its authority to order interim carriage, Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. 2718, 2728 & nn.57-58

(2011). But that conclusion depended on the Commission’s view that section 325 itself forbids such a result, which, as I discuss below, I think is incorrect as to interim carriage and especially interim carriage as a remedy for breach of the duty to negotiate in good faith.

**A. The FCC Has Plenary Authority over the Broadcast and Cable Industries**

13. Although the FCC’s authority is not literally over all “interstate communications by wire and radio,” the Commission’s power and duty to supervise communications is perhaps at its height when it comes to broadcasting. The FCC is given broad rulemaking authority over all spectrum services. 47 U.S.C. § 303(r). The Commission may impose any conditions on broadcast licenses that it finds to be in the public interest. 47 U.S.C. § 309. The Supreme Court has repeatedly emphasized that Congress empowered the Commission to protect the “public interest,” by giving it broad authority over broadcasting, broad enough to keep abreast of changes in the industry. “The ‘public interest’ to be served under the Communications Act is thus the interest of the listening public in ‘the larger and more effective use of radio.’ § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest.” *NBC v. United States*, 319 U.S. 190, 216 (1943); *see also id.* at 219 (“The Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate”); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940) (“in granting, denying, modifying or revoking licenses for the operation of stations, ‘public convenience, interest, or necessity’ was the touchstone for the exercise of the Commission’s authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public

interest, when the Commission's licensing authority is invoked ... were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest.”).

14. The Commission has similarly broad authority over all but the most local issues affecting cable television and other multichannel video programming distributors. As already noted, the Supreme Court authorized the Commission’s initial regulation of cable even before the Act was amended to cover that service, relying on Congress’s intent that the Commission comprehensively superintend broadcasting. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168 (1968).

15. More recently, the Supreme Court has affirmed the FCC’s broad rulemaking authority over all provisions of the Communications Act of 1934, including subsequent amendments such as the Cable Acts. In *AT&T v. Iowa Utilities Board*, the Court held that section 201(b)’s general rulemaking grant extended to the 1996 Act’s local competition provisions because those provisions were “inserted into the Communications Act of 1934.” 525 U.S. 366, 377 (1999). The Sixth Circuit has relied on this same logic to hold that the FCC, under section 201(b), has rulemaking authority over cable television-related provisions added to the Communications Act. *Alliance for Community Media v. FCC*, 529 F.3d, 773-75 (6<sup>th</sup> Cir. 2008). Similarly, relying in part on *Iowa Utilities Board*, the Seventh Circuit has found that the FCC has rulemaking authority over the cable provisions of the Act: “The FCC’s regulatory authority was first set out in *United States v. Southwestern Cable* and its authority continues to be recognized. See *AT&T v. Iowa Utilities Bd.* We have said that the FCC is charged by Congress with administration of the Cable Act.” *City of Chicago v. FCC*, 199 F.3d 424,428 (7<sup>th</sup> Cir. 1999) (citing *Time Warner Cable v. Doyle*, 66 F.3d 867 (7<sup>th</sup> Cir. 1995); other citations omitted).

Section 325, through all of its various amendments, has always lived as a part of the Communications Act.

16. To be sure, the Act also contains specific grants or recognitions of rulemaking authority (as section 325 does), but those specific grants do not derogate from the broad background grants of authority to the Commission. Precisely this question was at issue in the *Iowa Utilities Board* case, where those objecting to Commission rulemaking under the 1996 Act's local competition provisions said that provisions requiring specific Commission rulemakings necessarily meant that the Commission did not have authority to conduct other rulemakings implementing those sections. The Supreme Court unequivocally rejected that argument. "It seems to us not peculiar that the mandated regulations should be specifically referenced, whereas regulations permitted pursuant to the Commission's § 201(b) authority are not. In any event, the mere lack of parallelism is surely not enough to displace that explicit authority. We hold, therefore, that the Commission has jurisdiction to design a pricing methodology." *AT&T v. IUB*, 525 U.S. at 385.

17. One of the specific manifestations of the Commission's broad authority is in its strong remedial powers. As to broadcasters, the Commission is authorized to revoke a license for "willful or repeated failure to observe" any provision of the Act or rule of the Commission. 47 U.S.C. § 312(a)(4). The Commission may also issue cease and desist orders to direct compliance with the Act and FCC rules, without finding that a violation has been willful or repeated. 47 U.S.C. § 312(b); see *Syracuse Peace Council v. FCC*, 867 F.2d 654, 658 n.2 (D.C. Cir. 1989) ("The Commission imposes a continuing obligation on licensees to operate 'in the public interest' via its power under 47 U.S.C. § 312(b) to issue cease-and-desist orders for failing to operate substantially as set forth in their licenses."). And in *Southwestern Cable*, the Court,

while noting the Commission’s broad cease and desist authority, said that the Commission was not tied even to it, but could issue orders under section 154(i) to respond to changing circumstances under the Act. *Southwestern Cable*, 392 U.S. at 180-81. Finally, the enforcement provisions of the Act broadly permit the FCC to issue “any order,” 47 U.S.C. § 402, and to impose forfeitures, 47 U.S.C. §§ 502, 503, to remedy violations of the Act or of its rules.

### **B. Prohibitions of FCC Authority Are Rare and Specific**

18. The Communications Act does contain a number restrictions on FCC authority, but those restrictions are relatively few in comparison to the Commission’s overall powers in the markets that it regulates. In those instances in which the Act creates a carve-out from Commission authority, the Act does so in terms specific to the agency’s power. In this regard, I distinguish those situations in which the Act does not grant authority over a service at all and those situations in which the Act clearly grants the FCC authority and then some specific provision withdraws that authority as to some particular matter. In the first category, one might place such rules as the dividing line between common carrier and non-common-carrier services. Title II applies only to common carrier services. Prior to this rule’s being codified in the definition of “telecommunications carrier,” 47 U.S.C. § 153(51); *see Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014), the Act nowhere contained a provision specifically forbidding common carrier regulation (and all that implies for FCC authority) of private carriers. *See, e.g., Southwestern Bell Tel. Co. v. FCC*, 9 F.3d 1475, 1480 (D.C. Cir. 1994) (“All of the described regulation of tariffs under title II of the Act, however, hinges upon the premise that the regulated entity is a common carrier.”). Or consider the D.C. Circuit’s broadcast flag ruling: that decision turns on the holding that the FCC’s jurisdiction over “communications” (however broad otherwise) did not extend to equipment used in recording broadcasts – even though no provision

of the Act said that the FCC did not have authority over recording equipment. *See American Library Ass’n v. FCC*, 406 F.3d 689, 692 (D.C. Cir. 2005).

19. In this regard, the question of finding the Commission’s ancillary authority is simply another path to say, as the Supreme Court did in *Southwestern Cable*, that Congress has delegated power to the agency to regulate a particular service. *See also American Library Ass’n*, 406 F.3d at 692. The difficulties that these cases sometimes present of struggling to determine whether the Commission has authority over particular services has to do with the difficulty of applying the “ancillariness” test. “The Commission recognized that it may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities.” *Id.* at 692-93.<sup>4</sup>

20. In those circumstances, however, in which Congress through the Act has given the Commission a broad grant of authority over a particular service, as it undeniably has with common carriers, broadcasting, and MVPDs, any provisions withdrawing that agency authority have done so quite specifically. For example, the poster child of such provisions, section 152(a), states that “nothing in this chapter shall be construed to apply or to give the Commission

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<sup>4</sup> As a result, there is no inconsistency if one concludes, as I have, that the Commission lacks substantial regulatory authority over the Internet by saying that, while the Internet is a communications service “by wire or radio,” Internet regulation would not be ancillary to anything in the Act. One can also say, as I have, that the entire doctrine of ancillary authority is suspect under first principles of administrative law, which should require explicit delegation of regulatory authority from Congress to the agency. *See, e.g.,* James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. Telecom. & High Tech. L. 101 (2010); James B. Speta, *FCC Authority to Regulate the Internet: Creating It and Limiting It*, 35 Loy. U. Chi. L. J. 15 (2003). The doctrine of ancillary authority has nothing to do with the issue here, given the FCC’s clearly delegated authority over broadcast and cable.

jurisdiction with respect to” several intrastate aspects of communications service. This provision withdraws authority otherwise granted by section 151, 154, and similar provisions. Another example is section 543(a)(1), which effects its withdrawal of authority by stating: “No Federal agency ... may regulate the rates for the provision of cable service except to the extent provided under this section and section 612.” *See* 47 U.S.C. § 543(a)(1); *see also* 47 U.S.C. § 543(e)(1) (“no Federal agency ... may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantage group discounts”); 47 U.S.C. § 544a(b)(2) (“the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers’ television receivers or video cassette recorders”).

21. Indeed, that a withdrawal of Commission jurisdiction should be stated with specificity is another of the lessons of *Iowa Utilities Board*. As already noted, the Court there said that, where the Commission has general supervisory authority over the subject matter, further provisions that specifically called for certain regulations did not negate the Commission’s general authority. *See supra* ¶ 16. The Court’s holding thus begins with the premise that section 201(b) “means what it says” and that the Commission has substantive rulemaking authority over everything in the Act. 525 U.S. at 378-79. Characterizing those objecting to the application of this broad authority as advancing arguments that were tenuous – “[r]espondents’ argument on this point is (necessarily) an extremely subtle one,” *id.* at 379 – the Court again and again turned away suggestions that one should *imply* limits on the Commission’s authority, saying that “none of the statutory provisions ... displaces the Commission’s general rulemaking authority.” *Id.* at 385.

22. Both *Midwest Video II* and *Verizon v. FCC* are perfectly consistent with this general construct. In *Midwest Video II*, the Court had already found that the FCC could regulate cable television within its ancillary authority. But, because the Commission relied on the broadcasting provisions as the source of “ancillarity” and those provisions specifically forbade the Commission to apply common carrier rules to broadcasters, the Court held that the FCC could not apply common carrier rules to cable television companies. “The language of § 3(h) is unequivocal; it stipulates that broadcasters shall not be treated as common carriers. As we see it, § 3(h), consistently with the policy of the Act to preserve editorial control of programming in the licensee, forecloses any discretion in the Commission to impose access requirements amounting to common-carrier obligations on broadcast systems.” *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979). In *Verizon*, the D.C. Circuit held that the FCC had been given (more or less) general authority over broadband services by section 706 of the 1996 Act, 47 U.S.C. § 1302. It was only the definitional – and explicit -- prohibition of applying common carrier regulation to non-common-carrier services in § 153(51) that forbade the Commission’s specific decision. *See Verizon v. FCC*, 740 F.3d at 649-52.<sup>5</sup>

23. In sum, starting from Congress’s grants of authority to the Commission present in sections 151, 201, 303, 312, and elsewhere in the Communications Act demonstrates that Congress intended the agency to have broad authority over all aspects of broadcasting and cable

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<sup>5</sup> Both of these provisions are explicit withdrawals of specific regulatory authority. Section 153(11), defining common carrier, says “a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.” 47 U.S.C. § 153(11). And the definition of telecommunications carrier states: “A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.” 47 U.S.C. § 153(51).

services. Where Congress intended to cut back that broad authority, it stated so explicitly in the statute.

#### **IV. Section 325 Recognizes Broad FCC Authority**

24. This brings us to the interpretation of section 325 specifically, and whether the section 325(b)(1)(A) divests the Commission of any regulatory authority to address the problem of blackouts during the negotiation of renewal retransmission consent agreements. I believe that it does not. As already noted, I believe that the Commission's current position that it has little authority starts from the wrong place, considering the Commission's quite strong authority over both broadcasting and cable under the Act as a whole. I also believe that the Commission's treatment of section 325(b)(1)(A) as a common law property right over which a party may refuse to negotiate does not situate retransmission consent within the broader regulatory context in which it was adopted. Finally, I believe that section 325 itself recognizes FCC authority to create substantive and procedural rules – and to issue accompanying orders – to implement the retransmission consent regime. The Commission's authority to issue such rules, including for example rules that create procedures for renewal negotiations, is consistent with the broadcaster's ability, recognized in section 325(b)(1)(A) to negotiate in good faith to impasse and then to withhold consent for retransmission.

##### **A. Section 325 Is Part of a Broader Regulatory Regime**

25. A broadcaster's ultimate ability to refuse retransmission consent is not a standalone provision of the Act.<sup>6</sup> Rather, when it was initially adopted, broadcasters did not have the right to refuse cable companies' retransmission of their signals, for the Supreme Court

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<sup>6</sup> On this context, *see generally*: Stuart Minor Benjamin & James B. Speta, Telecommunications Law and Policy ch. 9 (4<sup>th</sup> ed. 2015); Olivier Sylvain, *Disruption and Deference*, 74 Maryland L. Rev. 715, 743-58 (2015).

had twice ruled that cable retransmission did not violate any copyrights the broadcasters may have had (or may have been assigned). *See Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 395 (1968); *Teleprompter v. Columbia Broadcasting System*, 415 U.S. 394 (1974). Indeed, the fact that the Supreme Court held that copyright did not initially extend to forbid retransmission weighs against any assertion that broadcasters' withholding of consent under section 325(b)(1)(A) is simply the exercise of a common law right.

26. Today, the system of retransmission consent is nested within several related provisions of the Copyright and Communications Acts. Although these provisions were not all adopted simultaneously, they are related and together constitute a fairly specific body of law regarding the relationship between broadcasters and MVPDs with respect to broadcast content. First, Congress amended the Copyright Act to add the Transmit Clause to the public performance right. 17 U.S.C. § 101(2). Second, Congress granted in the Copyright Act a compulsory license to those cable companies exercising retransmission rights pursuant to the Communications Act. 17 U.S.C. § 111. Congress delegated to the Copyright Office the authority to administer the payments made under that compulsory licensing scheme. *Id.* Third, Congress created the retransmission consent regime, but, fourth, retransmission consent was paired with a must carry regime under which broadcasters can demand carriage of their signals. 47 U.S.C. §§ 534, 535.

27. These provisions reflect a series of Congressional judgments as to the various interests at issue, ranging from the interests of copyright holders to broadcasters to MVPDs to the viewing public. *See Sylvain, supra*, 74 Maryland L. Rev. at 742 (the amendments to the Copyright and Communications Acts “define the legal obligations and entitlements of the variety of extant stakeholders in the field of broadcast and video distribution”). What is clear is that Congress did not adopt an entirely private-property regime, either for copyright owners,

broadcasters, or MVPDs. As will be discussed more with respect to section 325 below, the statutory scheme does depend on negotiations in the first instance, but these provisions limit each of the relevant parties' ability to deny access. Copyright owners are limited by the compulsory license; broadcasters are limited by the duty to negotiate in good faith; and MVPDs are limited by their must carry obligations.

28. Even more broadly, the retransmission consent regime is substantially affected by the rules governing network non-duplication and syndicated exclusivity, as the FCC has recognized in its ongoing proceeding in MB Docket 10-71. Amendment of the Commission's Rules related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. 3351, 3390-96 (2014). Those rules are significantly responsible for the bargaining leverage that local broadcasters have over local MVPDs, who cannot turn to other sources of signals.

**B. Section 325 Contemplates Substantive and Procedural Rulemakings by the Commission**

29. Section 325 itself contains a number of provisions that recognize the Commission's authority to make substantive and procedural law governing the exercise of retransmission consent rights and the negotiation of retransmission consent agreements. A number of parties have taken the position in this rulemaking that "the Commission has no authority to use the rules requiring a good faith negotiation *process* as a means to intrude in the *substance* of negotiations ...."<sup>7</sup> But that view is nowhere clearly stated in the text of section 325.

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<sup>7</sup> Comments of 21<sup>st</sup> Century Fox, Inc. and Fox Television Stations, LLC, Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test, p. 10 (filed Dec. 1, 2015) (emphasis in original); *see also id.* at 14 ("Section 325(b) is expressly limited to the process by which a broadcast station may (but is not required to) authorize an MVPD to retransmit the station's signal. The provisions of this Section – including the good faith requirements – regulate the *process*, not the *outcome*, of negotiations over retransmission

To the contrary, section 325 itself indicates that the Commission should consider substantive matters in adopting rules governing retransmission consent. Moreover, the legislative history of this STELA reauthorization indicates that Congress understood the interaction between substance and procedure and directed the Commission to look at substance: “The Committee expects the FCC’s totality of the circumstances test to include a robust examination of negotiating practices, including whether substantive terms offered by a party may increase the likelihood of the negotiations breaking down.”<sup>8</sup>

30. First, section 325(b)(3)(A) provides that the Commission “shall ... establish regulations to govern the exercise by television broadcast stations of the right of retransmission consent ... and of the right to signal carriage.” 47 U.S.C. § 325(b)(3)(A). Although this section refers to an initial rulemaking after the 1992 Cable Act’s passage (*id.*), the Commission itself has relied upon it in subsequent proceedings as recognizing the Commission’s authority over retransmission consent. *See, e.g.*, Amendment of the Commission’s Rules Related to Retransmission Consent, First Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. at 3371, ¶ 30.

31. Second, that same subsection says that the “Commission *shall consider* ... the impact [of retransmission consent] ... on the rates for the basic service tier ... and shall ensure

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...”) (emphasis in original); Comments of the Walt Disney Company, Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test, p. 10 (STELAR “does not alter the fundamental nature of the good faith standard, whose purpose is to regulate the *procedural* elements of retransmission consent negotiations) (filed Dec. 1, 2015) (emphasis in original); *id.* at 10-11 (“Neither provision even addresses the substance of retransmission consent negotiations or agreements ...”); Comments of the National Association of Broadcasters, Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test, p. 43 (filed Dec. 1, 2015) (“The Commission previously rejected that course, stressing that the ‘totality of the circumstances test’ should not ‘serve as a back door’ inquiry into the substantive terms negotiated between the parties.”).

<sup>8</sup> Satellite Television Access and Viewer Rights Act, Sen. Rep. No. 113-322, at 13 (2014).

that the regulations prescribed under this subsection do not conflict with the Commission’s obligation ... to ensure that the rates for the basic service tier are reasonable.” 47 U.S.C. § 325(b)(3)(A) (emphasis added). Rates, of course, are perhaps the most substantive of all considerations in communications regulation, and this provision says that the Commission’s regulations under section 325 “shall ensure” that rates are reasonable. In other words, nothing in the word “exercise” or elsewhere in 325(b)(3)(A) suggests that the FCC may not regulate the substantive aspects of the exercise of retransmission consent. Rather, the requirement that the FCC “shall” consider rates is itself a substantive inquiry.

32. Third, the statute requires broadcasters to negotiate retransmission consent agreements “in good faith,” and the good faith requirement has substantive aspects to it. 47 U.S.C. § 325(b)(3)(C)(ii). The Commission has rejected the claim that “good faith” is merely hortatory. *Good Faith Order*, 15 FCC Rcd. at 5455, ¶ 24. Moreover, the statute explicitly references one substantive test of “good faith” when it says that “it shall not be a failure to negotiate in good faith if the distributor enters into retransmission consent agreements containing different terms and conditions, including price terms, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace conditions.” 47 U.S.C. § 325(b)(3)(C)(ii). This provision contemplates that the Commission will review the substance of retransmission consent agreements and determine whether any differences “are based on competitive marketplace conditions,” in determining whether the broadcaster has negotiated in good faith.

33. Despite these references to the Commission’s authority to establish the procedural and substantive aspects of good faith negotiation of retransmission consent agreements, the Commission has said that the duty of good faith should be “narrowly construed.” *Good Faith*

*Order*, 15 FCC Rcd. at 5453, ¶ 20. The Commission articulated two reasons: that the duty was in derogation of the common law right not to contract, and that the duty as appearing in analogous labor law was similarly narrow.

34. As already discussed, I believe that the Commission’s overall authority to superintend the broadcast and cable markets as well as the statutory and regulatory nature of the retransmission consent right defeats the analogy to common law rights. Although the Commission in the *Good Faith Order* followed commenters that suggested that withholding retransmission consent was a common law right, the Commission also acknowledged that “Congress intended the parties to retransmission consent have negotiation obligations greater than those under common law.” *Compare* 15 FCC Rcd. at 5453, ¶ 19 (adopting a narrow construction) *with id.* at 5455, ¶ 24 (acknowledging that Congress intended the duties to go beyond the common law). Broadcast and cable are regulated industries. One of the fundamental premises of broadcast regulation is that a broadcaster does not have a property right in its license. 47 U.S.C. § 301 (“It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license.”). This is a statutory field, not a common law field.

35. Moreover, given the statutory context in which good faith negotiations are *required* of parties who are subject to administrative regulation, any renewal negotiations are intertwined with the performance of an existing agreement. And, of course, contract law does recognize a duty of good faith in the performance of contractual obligations. *See, e.g.*, Rest. 2d

of Contracts § 205 (“Every contract imposes on each party a duty of good faith and fair dealing in its performance and enforcement.”). Parties can of course agree to negotiate in good faith, and that promise is enforceable. *See, e.g., Siga Technologies, Inc. v. Pharmathene, Inc.*, 67 A.3d 330, 343-47 (Del. 2013). More importantly, even if *contract law* does not impose a duty to negotiate in good faith, the Restatement recognizes that other bodies of law may do so. Rest. 2d Contracts § 205, cmt. c (“Bad faith in negotiation, although not within the scope of this section, may be subject to sanctions. . . . [R]emedies for bad faith in the absence of agreement are found in the law of torts or restitution.”). In this context, of course, the *statute* imposes a duty to negotiate in good faith, and empowers the Commission to substantively define that duty.

36. Similarly, the Commission drew on labor law in support of its narrow construction: “In this regard, there is substantial National Labor Relations Board (‘NLRB’) precedent that the good faith negotiation requirement applies solely to the process of the negotiations and does not permit the NLRB to require agreement or impose terms or conditions on collective bargaining agreements.” 15 FCC Rcd. at 5453, ¶ 22.

37. But the NLRB is certainly empowered to find that failure to negotiate in good faith constitutes an unfair labor practice, and the Board has significant remedial powers – including cease and desist powers – in situations in which it has found an unfair labor practice. The most analogous situation in labor law to a blackout during renewal negotiations would seem to be an employer lockout during negotiations with a union. An employer can violate the labor laws by locking out its employees if the employer’s position is in breach of its duty to bargain, even if the lockout is also for the permissible purpose of exerting economic pressure on the union employees. *See, e.g., Movers and Warehousemen Ass’n v. NLRB*, 550 F.2d 962, 966 (4<sup>th</sup> Cir. 1977); *see also Local 15 IBEW v. NLRB*, 419 F.3d 651, 660 (7<sup>th</sup> Cir. 2005). As a remedy for an

illegal lockout, the Board may order backpay. *Movers*, 550 F.2d at 966-67. And the Board may also order the employer to reinstate employees injured by the illegal lockout. *See, e.g., Eads Transfer, Inc. v. NLRB*, 989 F.2d 373, 375, 377 (9<sup>th</sup> Cir. 1993). Indeed, in *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153 (1<sup>st</sup> Cir. 1995), the First Circuit upheld a district court preliminary injunction in favor of the Board, in a case where the Board found an illegal employer lockout and ordered the employer to end the lockout and continue negotiations. *Id.* at 163-64.<sup>9</sup>

### C. Section 325's Limit on Commission Authority

38. None of the foregoing is meant to deny the effect of section 325(b)(1)(A), which does provide that “[n]o cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except ... with the express authority of the originating station.” 47 U.S.C. § 325(b)(1)(A). At bottom, that section does protect a broadcaster’s right to bargain, in good faith and consistently with governing FCC rules, to impasse and to deny a retransmission consent agreement. But the Commission may set substantive and procedural terms for the exercise of retransmission consent rights and for good faith negotiations. And the Commission may put in place remedies for denials of good faith and may set procedures for renewal negotiations that do not cross the line of denying broadcasters the right to reach impasse and deny consent. The Commission is no doubt correct that “Congress did not intend the Commission to sit in judgment of the terms of every retransmission consent

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<sup>9</sup> One case, while acknowledging a split in the circuits, has held that the Norris-LaGuardia Act prohibits a federal court injunction that would require an employer to terminate a lockout. *See Brady v. NFL*, 644 F.3d 661, 680-81 (8<sup>th</sup> Cir. 2011). But section 10(j) of the NLRA, added in the Taft-Hartley amendments of 1947, is an exception to Norris-LaGuardia, and it is that section that the First Circuit relied upon in *Rivera-Vega*. In all events, this shows the limits of any analogy to labor law, for nothing in section 325 or in the Communications Act limits the FCC’s authority, particularly its remedial authority, in the quite specific way the Norris-LaGuardia Act modified district court powers in labor disputes.

agreement executed between a broadcaster and an MVPD.” *Good Faith Order*, 15 FCC Rcd. at 5453, ¶ 23. But the Commission can take actions that fall far short of that level of intrusion, in my view, so long as it respects some right to bargain in good faith to impasse.

**D. Section 325’s Legislative History Confirms this Balance**

39. The legislative history seems consistent with this construction of the statute, in that it states *both* that the market technique of negotiations should resolve most retransmission consent issues *and* that the FCC has authority to remedy instances of noncompliant non-consent. As a threshold matter, however, the most important point from the legislative history is that Congress clearly expected that outright denials of retransmission of broadcast content would be either very rare or nonexistent. The Senate Report, for example, notes its expectation that the retransmission consent regime will result in “minim[al] disruption to broadcasters and cable operators” and that the rights will be exercised “harmoniously.” 1992 U.S.C.C.A.N. at 1169, 1171.

40. More specifically, parties have previously quoted from the legislative history conflicting statements to support their views on the FCC’s authority to order interim carriage. Thus, the Commission and parties such as the National Association of Broadcasters have noted those portions of the legislative history that state that the retransmission consent regime relies on negotiations and not on administrative rate-setting. In the 2011 NPRM, the Commission stated: “[C]onsistent with the statutory language, the legislative history of Section 325(b) states that the retransmission consent provisions were not intended ‘to dictate the outcome of the ensuing marketplace negotiations’ and that broadcasters would retain the ‘right to control retransmission and to be compensated for others’ use of their signals.’” Amendment of the Commission’s Rules Related to Retransmission Consent, Notice of Proposed Rulemaking, 26 FCC Rcd. at 2728, ¶ 60

(quoting S. Rep. No. 92, 102d Cong., 1<sup>st</sup> Sess. 1991, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1169). The NAB quotes this same language and adds that “Congress intended to create a free ‘marketplace for the disposition of the rights to retransmit broadcast signals.’”<sup>10</sup>

41. On the other hand, other parties including Mediacom Communications<sup>11</sup> point to clear statements in the legislative history that say that the Commission has authority to order the parties to reach agreement if they cannot resolve their disputes through negotiation. “The FCC does have authority to require arbitration” if the parties cannot agree. 138 Cong. Rec. S667 (Jan. 30, 1992) (Sen. Inouye); *see also id.* at S643 (“the FCC has the authority under the Communications Act to address what would be the rare instances in which such carriage agreements are not reached.”); 138 Cong. Rec. S14604 (“existing law provides the FCC with both the direction and authority to ensure that the retransmission consent provision will not result in a loss of local TV service”).

42. These pieces are largely consistent with the interpretation of section 325 that I have offered above. The Commission has significant supervisory authority over the retransmission consent process, but is supposed to let negotiations lead and, ultimately, broadcasters may negotiate in good faith to impasse (although such impasses were thought to be exceedingly rare).

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<sup>10</sup> Comments of the National Association of Broadcasters, Amendment of the Commission’s Rules Related to Retransmission Consent, p. 18 (filed May 27, 2011) (quoting S. Rep. No. 102-92, at 36).

<sup>11</sup> *See* Joint Reply Comments of Mediacom Communications Corporation and Cequel Communications LLC D/B/A Suddenlink Communications, Petition for Rulemaking to Amend the Commission’s Rules Governing Retransmission Consent, pp. 37-39 (filed June 3, 2010).

## V. *Chevron* Analysis

43. Although the foregoing points towards significant freedom for the Commission to adopt remedies for failures to negotiate in good faith as well as significant procedural governance of the negotiation process, each of these elements also fits into a standard *Chevron* analysis of Commission action that might move in this direction. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

44. For purposes of this exercise, consider initially the following two possible actions by the FCC: (1) An FCC rule that each retransmission consent agreement shall contain certain procedures concerning renewal negotiations, which provisions might include a cooling-off period, mediation, and interim carriage during these two procedures; and (2) An FCC rule or order directing a broadcaster to permit interim carriage of its channel as a remedy for the failure to negotiate in good faith. The FCC would connect these two rules by saying that the procedures governing renewal negotiations are “good faith” procedures for renewal negotiations. (By “interim carriage,” I mean simply that the time of the previous retransmission consent agreement has expired and the broadcaster has not voluntarily extended permission to carry during that time.)

### A. Step Zero

45. Congress has undoubtedly delegated to the FCC the authority to make law concerning broadcasting and cable television generally and retransmission consent specifically. This is the question at step zero of the *Chevron* analysis: whether Congress has delegated to the agency power to make rules or issue orders with the force and effect of law. *See United States v. Mead Corp.*, 533 U.S. 218, 231-32 (2001) (touchstone for *Chevron* deference is whether “Congress meant to delegate authority to [the agency to act] with the force of law”). As

discussed above, Congress gave the Commission general rulemaking authority over broadcasting licenses and licensees and over cable television companies. *See supra* ¶¶ 13-15.

46. Congress also specifically recognized Commission rulemaking authority over retransmission consent, when it stated in section 325 that the Commission must “commence a rulemaking proceeding to establish regulations” governing retransmission consent. 47 U.S.C. § 325(b)(3)(A); *see supra* ¶ 29. Note that this provision is *not* written as a grant of rulemaking authority itself – it does not say “the Commission has the authority to make such rules and regulations necessary to implement retransmission consent.” Rather, the provision pulls on the Commission’s pre-existing regulatory authority over broadcasters and cable which, as noted above, is very broad.

#### **B. Step One**

47. In step one of the *Chevron* analysis, the question is whether Congress spoke clearly to the precise question raised by the new rules on interim carriage. *See Chevron*, 467 U.S. at 843. In general, this is answered only by looking at the statutory text as adopted by Congress, but some decisions also take into account legislative history in asking whether Congress has spoken clearly.<sup>12</sup>

48. Nothing in the Act clearly and precisely precludes the example FCC actions posited here. Section 325 recognizes FCC authority to adopt rules to govern the exercise of retransmission consent and for the Commission to define “good faith” negotiations. As noted above, section 325 itself includes some substantive aspects to both of these provisions. *See supra* ¶¶ 29-32. And nothing in section 325 (or elsewhere in the Act) addresses whether the

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<sup>12</sup> In this case, there is no need to resolve this potentially unresolvable issue of statutory interpretation in administrative law cases.

FCC can require the parties to include in their retransmission consent provisions procedures that include consent to interim carriage during a cooling off period or a mediation.

49. Specifically, in my view, section 325(b)(1)(A) does not clearly preclude these rules. Although that section says that a signal may not be carried without the broadcaster's consent, the rules have been structured so that the parties do in fact consent to the renewal negotiation procedures and interim carriage in their initial retransmission consent agreement. The statute recognizes that the Commission will set rules governing "the exercise" of retransmission consent. 47 U.S.C. ¶ 325(b)(3)(A). Those rules may limit the substance and procedure of the exercise of retransmission consent. The statute does not clearly forbid an FCC rule that requires an interim consent.

50. In this regard, the FCC's authority to issue cease and desist orders should resolve any lingering dispute about the FCC's authority to order carriage if, notwithstanding the consents in a prior agreement, a broadcaster "blacks out" a signal during the renewal procedures. By hypothesis, such an action would violate an FCC rule requiring consent to renewal negotiation procedures and interim carriage, and therefore section 303(r) would authorize an FCC order to "cease and desist" withholding consent. The affected MVPD would then, as a matter of law, have the consent of the broadcaster.

51. For similar reasons, I do not think that section 325(e), on which the Commission has also relied to hold that it does not have authority to order interim carriage, restricts the rules I have imagined here. *See Good Faith Order*, 15 FCC Rcd. at 5471, ¶ 60. Section 325(e) does enumerate four defenses, but if the FCC's rules were framed as measures to which a party must consent as part of its duty to negotiate in good faith, the complaint would independently have no merit. Moreover, the FCC's remedial authority is surely broad enough to dismiss a complaint

brought by a party that the Commission has found is withholding consent in breach of FCC rules, its duty to negotiate in good faith, or both.

52. Nothing in the legislative history, to the extent such history is relevant, clearly speaks to the matter. While the legislative history does say that the market should ultimately determine the terms of a retransmission consent agreement, the history does not appear to squarely address the issue of interim carriage or the use of interim procedures as part of implementing the duty to negotiate in good faith. The quotes relied upon by the Commission and the NAB, *supra* ¶ 40, forbidding the Commission to “dictate” terms of a retransmission consent regime, also seem inapposite. The Commission can order more negotiation procedures without prescribing the ultimate resolution. As the Commission said when it adopted rules forbidding joint negotiation: “[R]ather than ‘dictating the outcome,’ of the negotiation, our rule simply addresses the process of retransmission consent negotiations in a manner that protects the competitive working of the marketplace in which retransmission consent is negotiated. The rule neither compels negotiating parties to reach agreement nor prescribes the terms and conditions under which MVPDs may transmit broadcast signals.” Amendment of the Commission’s Rules related to Retransmission Consent, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd. at 3373, ¶ 32. To the extent that the legislative history establishes a right to “payment,” any interim carriage solution could easily be paired with a payment under either the old or new retransmission consent agreement.

### **C. Step Two**

53. Two objections might be made at step two, but neither of them seems convincing. At step two, a court asks whether the agency’s interpretation of the statute is “permissible.” *Chevron*, 467 U.S. at 843 (“if the statute is silent or ambiguous with respect to the specific issue,

the question for the court is whether the agency's answer is based on a permissible construction of the statute").

54. First, one might object that these rules gut the "consent" requirement of section 325(b)(1)(A). If the FCC can order consent to interim carriage as a part of a retransmission consent agreement, the argument would go, couldn't the FCC also order perpetual consent to carriage or consent to carriage for \$1? The initial rejoinder would be, of course, that these (hypothetical) regulations do not in fact do that. These requirements for renewal negotiations and for interim carriage during good faith renewal negotiations derive from the FCC's recognized authority to make rules both over "the exercise" of retransmission consent and over the meaning of good faith negotiations. A rule that ordered perpetual consent or consent for \$1 would not only be contrary to the core of the retransmission consent right in section 325(b)(1)(A), it would also lose its connection to the FCC's authority over "the exercise" of retransmission consent and good faith negotiations.

55. In this regard, the FCC would not be committing the error the Supreme Court found in *Iowa Utilities Board*. There, the Court rejected the FCC's initial implementation of the unbundling aspects of the local competition provisions of the 1996 Act because it said that the Commission had failed to give "some substance" to the relevant statutory language (the "necessary" and "impair" standards). *Iowa Utilities Board*, 525 U.S. at 391-92 ("Section 251(d)(2) ... requires the Commission to determine on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements"). In this case, the FCC's rules would give section 325(b)(1)(A) "some substance," because they would maintain the idea, core to section 325(b)(1)(A), that a broadcaster may negotiate in good faith to impasse and thereafter deny

retransmission consent, but also more expansively than now implement rules governing the “exercise” of retransmission consent and good faith negotiations.

56. Second, and relatedly, one might object to the seemingly artificial manner in which the rules impose “consent” requirements on the parties. On the one hand, this objection actually proves that the FCC likely could proceed directly – that is, to order a broadcaster to consent to interim carriage as part of its rules governing “the exercise” of retransmission consent or as a remedy for bad faith negotiation, even without specific conditions being previously nested within a retransmission consent agreement. Given the breadth of the FCC’s rulemaking and enforcement authority and the explicit recognition of its authority to superintend good faith negotiations, it would be particularly odd to think that the FCC could not enforce the good faith requirement by ordering a broadcaster to consent to interim carriage as a remedy. On the other hand, that the FCC uses the statutory language creatively does not make it unreasonable. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (“it is axiomatic that the [agency’s] interpretation need not be the best or most natural one by grammatical or other standards. Rather, the [agency’s] view need be only reasonable to warrant deference”).

57. Finally, the FCC’s prior conclusion of a more limited scope for its good faith rules should not deter the adoption of a more robust procedural and substantive interpretation of the duty to negotiate in good faith. As a threshold matter, both the Supreme Court and the D.C. Circuit have emphasized that courts defer to the agency’s statutory construction even if the agency has changed its interpretation – so long as the current interpretation is reasonable. *See Nat’l Cable Television Ass’n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 981 (2005); *Verizon*, 740 F.3d at 636.

58. Moreover, the difference between a somewhat more robust position and the modifications offered here should not be exaggerated. The FCC has never denied – indeed, it has affirmed – its authority to adopt rules to implement the retransmission consent regime, and the Commission has similarly affirmed that it has authority to implement specific requirements under its duty to enforce good faith negotiations. *See Good Faith Order*.

### **Conclusion**

59. Analysis of the Commission’s authority to implement a given provision of the Communications Act should start with the Commission’s undoubted, broad authority to make law for the industries identified in the Act – common carriers, broadcasters, cable, and other MVPDs. Acting in these areas, and particularly in the area of broadcast, Congress empowered the FCC to act in the public interest as it determined it, and as necessary to respond to changing circumstances. Thus, the FCC presumably has the authority to adopt rules over the retransmission consent regime. Indeed, this understanding is confirmed by section 325 itself. Far from being a standalone recognition of a preexisting property right, section 325 is part and parcel of an administrative regime – part copyright and part communications law – through which Congress sought to balance multiple competing considerations. The overriding consideration, however, was to ensure that all Americans – whether watching over the air or over an MVPD – would receive broadcast content. Congress sought to harness the efficiency of negotiations, but also required the parties to negotiate in good faith. And section 325 recognizes the FCC’s authority, both as a matter of substance and as a matter of procedure, to adopt rules to implement the exercise of retransmission consent rights and the duty to negotiate in good faith.

60. Thus, the Commission has ample authority to adopt additional requirements under these powers, including (but not limited to) additional procedures during renewal negotiations

and even interim carriage, both during those procedures and as a remedy for any breach of the duty to negotiate in good faith.

61. I leave to the Commission and others whether additional rules are justified as a matter of policy, but it is my view that, so long as it maintains a focus on the exercise of rights during good faith negotiation and maintains the ability of broadcasters to negotiate in good faith to impasse and forego retransmission consent, the FCC has authority to adopt such additional rules.

Respectfully submitted,

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### ***PUBLICATIONS***

TELECOMMUNICATIONS LAW AND POLICY (4<sup>TH</sup> ED. 2015) (casebook) (with Stuart Benjamin).

*The United States' Uncertain Approach to Network Neutrality*, 7 J.L. & Econ. Reg. 27 (2014).

*Unintentional Antitrust: The FCC's Only (and Better) Way Forward with Net Neutrality after the Mess of Verizon v. FCC*, 66 Fed. Comm. L.J. 491 (2014).

*An Appropriate Interconnection Backstop*, 12 J. Telecom. & High Tech. L 166 (2014).

TELECOMMUNICATIONS LAW AND POLICY (3<sup>D</sup> ED. 2012) (casebook) (with Stuart Benjamin, Howard Shelanski, and Philip Weiser).

*Supervising Discrimination: Reflections of the Interstate Commerce Act in the Broadband Debate*, 95 Marq. L. Rev. 1195 (2012) (symposium on 125<sup>th</sup> anniversary of the ICA).

*Reconciling Breadth and Depth in Digital Age Communications Policy*, in *Communications Law and Policy in the Digital Age* (Randolph J. May, ed. 2012).

*Supervising Managed Services*, 60 Duke L.J. 1715 (2011).

*The Shaky Foundations of Internet Regulation*, 7 J. Telecom. & High Tech. L. 100 (2010).

*Modeling an Antitrust Regulator for Telecommunications*, in *Balancing Antitrust and Regulation in Network Industries* (F. Leveque ed. 2010).

*A Sensible Next Step on Network Neutrality: The Market Power Question*, 8 Rev. Network Econ. 113 (2009).

*Spectrum Policy Experiments: What's Next?*, 2008 U. Chi. Legal Forum 389.

*Resale Requirements and the Intersection of Antitrust and Regulated Industries*, 31 J. Corp. L. 307 (2006).

*Making Spectrum Reform "Thinkable,"* 4 J. Telecom. & High Tech. L. 183 (2006).

*Rewriting U.S. Telecommunications Law with an Eye on Europe*, in *Connecting Markets & Societies* (Jürgen Müller & Brigitte Preissl, eds.) (2006).

*An Overview of Media Concentration in the United States: Regulation and the Theory of Deregulation*, in *Digitale Satellitenplattformen in den USA und Europa und ihre Regulierung* (Institutes für Europäisches Medienrecht 2005).

*Policy Levers in Korean Broadband*, 4 J. Korean Law 1 (2004).

*Deregulating Telecommunications in Internet Time*, 61 Wash. & Lee L. Rev. 1063 (2004).

*Vertical Regulation in Digital Television: Explaining Why the United States Has No Access Directive*, in *Regulating Access to Digital Television Technical Bottlenecks, Vertically-Integrated Markets and New Forms of Media Concentration* 53-65 (European Audiovisual Observatory 2004).

*Antitrust and Local Competition under the Telecommunications Act*, 71 Antitrust L.J. 99 (2003).

*FCC Authority To Regulate The Internet: Creating It and Limiting It*, 35 Loy. U. Chi. L.J. 15 (2003).

*Competitive Neutrality in Right of Way Regulation: The Consequences of Convergence*, 35 Conn. L. Rev. 763 (2003).

*Maintaining Competition in Information Platforms: Thoughts on Vertical Restrictions in Emerging Information Platforms*, 1 J. Tel. & High Tech. L. 185 (2002).

*A Vision of Internet Openness by Government Fiat*, 96 Nw. U. L. Rev. 1553 (2002) (reviewing Lawrence Lessig, *The Future of Ideas: the Fate of the Commons in a Connected World*).

*A Common Carrier Approach To Internet Interconnection*, 54 Fed. Comm. L.J. 225 (2002).

*The Vertical Dimension of Cable Open Access*, 71 Colo. L. Rev. 975 (2000).

*Handicapping the Race for the Last Mile?: A Critique of Open Access Rules for Broadband Platforms*, 17 Yale J. on Reg. 39 (2000).

*Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 Nw. U.L. Rev. 1277 (1999).

*Internet Theology*, 2 Green Bag 2d 227 (1999) (reviewing Mike Godwin, *Cyber Rights* (1998)).

Hon. Harry T. Edwards and James B. Speta, "Our Federalism": Doctrines of Legislative and Judicial Federalism in the United States (Comparative Lessons for "Subsidiarity" in the European Community?) (Mentor Group Working Paper 1993).

Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection, and the Eighth Amendment*, 89 Mich. L. Rev. 165 (1990).

## **WORKING PAPERS**

*Screening and Simplifying the Competition Arguments in the NBC/Comcast Transaction*,

Technology Policy Institute (May 5, 2010) ([http://techpolicyinstitute.org/files/nbc\\_comcast\\_speta.pdf](http://techpolicyinstitute.org/files/nbc_comcast_speta.pdf)).

*The Consumer Benefits of Video Franchise Reform in Illinois*, Heartland Policy Study #112 (2007) (with John Skorburg & Steven Titch).

*Network Neutrality Is a Federal Issue*, Free State Foundation Working Paper (2007).

### **GRANTS**

Measuring the Welfare Loss from the FCC's TV Table of Allocations, Searle Foundation, 2003-2004 (with David Haddock).

### **SELECTED PANEL & PAPER PRESENTATIONS**

An Appropriate Interconnection Backstop, Digital Broadband Migration, Silicon Flatirons, University of Colorado Law School, Feb. 2013.

Payment Innovation at the Contract/Carriage Interface, Telecommunications Policy Research Conference, September 2012. Also Tilburg University Law and Economics Seminar, Dec. 2012.

A Skeptical Approach to the Broadband First Amendment, Michigan State University School of Law, October 2011.

Video over the Top and the Future of Video Regulation, Tilburg University Center on Law and Economics, June 2011.

The FCC's Authority over Broadband Access, Wharton and Berkman Center Program, Washington D.C., May 2010.

Reverse Engineering Institutional Question from the *Comcast* Order, Silicon Flatirons Digital Broadband Migration, University of Colorado, February 2009.

The Future of Intercarrier Compensation, University of Pennsylvania Conference on 25 Years after the Bell Decree, April 2008.

The Year in Telecommunications Regulation, Searle Center on Law and Regulation, April 9, 2008.

Assessing the Progress of "Spectrum Reform," University of Chicago Legal Forum, October 27, 2007.

U.S. Broadcast Deregulation: Modest Thoughts for Korea, Seoul National University Center on Law and Public Utilities, September 14, 2007.

Getting Past the Network Neutrality Roadblock, SNU-Berkeley Centers for Law and Technology, January 2007.

The Digital Age Communications Act's Approach to Net Neutrality. March 2006.

Antitrust and Unfair Competition, SNU-Berkeley Centers for Law and Technology, Annual Conference, February 2006.

Antitrust and Regulation in Telecoms, Ecole des Mines, January 2006.

Commentary on the Federal/State Relations Proposal, Digital Age Communications Act Project, September 2005.

The Regulatory Framework Proposal, Digital Age Communications Act, June 2005.

VoIP Blocking and Network Neutrality, Congressional Internet Caucus, on April 19, 2005.

The Political Economy of Spectrum Reform, Silicon Flatirons, University of Colorado, February 2005.

Commentary on Broadcasting Convergence in the U.S. and Korea, SNU-Berkeley Centers for Law and Technology, Annual Conference, January 2005.

Options and Prospects for Voice over Internet Protocol Regulation, Presentation, Federal Communications Bar Association, October 2004.

Comparative Law and Economics of U.S. and European Telecommunications Reform, Telecommunications Policy Research Conference (Washington, D.C.), October 2004.

The FCC's Jurisdiction To Regulate the Internet, Cardozo Law School, September 2004.

Rewriting U.S. Telecommunications Law with an Eye on Europe, International Telecommunications Society, Berlin, Germany, September 2004.

Current U.S. Broadband Policy and Prospects for Deregulation, Presentations to Korean Ministry of Information and Communications and Korean Information Strategy Development Institute, June 2004.

U.S. Approaches To Vertical Media Regulation, Medienforum.nrw, Cologne, Germany, June 2004.

Untangling Copyright and Communications Law: The FCC's Digital Rights Management Policies, Michigan State University-DCL College of Law, March 2004.

Lessons from Korean Broadband Policy for the United States, SNU-Berkeley Technology Centers, February 2004.

Deregulating Telecommunications in Internet Time, Georgetown Law School Intellectual

Property and Technology Law Colloquium, December 2003.

U.S. Vertical Regulation of Digital Television Platforms, European Audiovisual Observatory & IVIR, University of Amsterdam, September 2003.

The Article I Authority of the FCC, Loyola University of Chicago, February 2003.

Legal Rules To Implement Dynamic Spectrum Sharing, Panel Presentation, Carnegie Mellon University, Insites Program, February 2002.

The Antitrust Regulation of Information Platforms, Panel Presentation and Paper, Silicon Flatirons, University of Colorado, January 2002.

Vertical Exclusivity in Third-Generation Wireless, Paper and Presentation, Pacific Telecommunications Council, Seoul, South Korea, June 2001.

Corporate Control and Industry Structure in Global Communications, London Business School, Paper Discussant, May 2001.

Cable Internet Regulation and Market Incentives for Openness, Stanford Center for Internet and Society, Panel Presentation, December 2000.

A Common Carrier Approach to Internet Interconnection, Paper and Presentation, Telecommunications Policy Research Conference, Washington, D.C., September 23, 2000.

Open Source and Open Access, Panel Presentation, The E-Business Transformation, Brookings Institution and Department of Commerce, September 2000.

Unbundling & Open Access, Telecommunications in the 21st Century, Paper and Presentation, University of Colorado Law Review, February 2000.

Telecommunications Innovation, Moderator, University of Chicago Legal Forum, October 1999.

Mandatory Resale Rules in Long Distance Markets: Regulation Searching for an (Economic) Justification, Working Paper and Presentation, Telecommunications Policy Research Conference, Washington, D.C., September 1999.

### ***TESTIMONY AND AGENCY SUBMISSIONS***

Testimony (invited panelist), Federal Communications Commission, Field Hearing on NBC/Comcast Merger, July 2010.

Testimony (invited panelist), Federal Communications Commission, Media Concentration Field Hearing, September 20, 2007.

Testimony, "Video Franchising Reform in Illinois," Illinois House Telecommunications

Committee, March 15, 2007.

Testimony, “Competition in the Communications Marketplace: How Technology Is Changing the Structure of the Industry,” House Energy & Commerce Committee, March 2, 2005.

Comments, Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, FCC GN Docket 00-185 (Jan. 19, 2001) [filed on behalf of AT&T Corp.].

Comments on Request by Staff of Senate Commerce Committee, Hearings on Internet Access and the Consumer, Senate Commerce Committee (April 13, 1999)  
(comments available at <http://www.senate.gov/~commerce/hearings/0414spe.pdf>).

Ex Parte Comments, In the Matter of the Merger of AT&T Corp. and MediaOne, Submitted to the Federal Communications Commission (Dec. 22, 1999) (addressing whether FCC should condition approval of merger on open access conditions).

### ***OTHER PROFESSIONAL ACTIVITIES***

*Amicus Curiae Brief*, to the United States Court of Appeals for the Ninth Circuit, in *O’Bannon v. NCAA* (addressing players’ rights of publicity and antitrust injury), January 2015.

*Amicus Curiae Brief*, to United States Court of Appeals for the D.C. Circuit, in *Comcast v. FCC* (addressing the jurisdiction of the FCC to regulate Internet services), August 2009.

Board of Academic Advisors, The Free State Foundation, 2008-present.

Advisory Board (including peer review), *I/S: A Journal of Law and Policy for the Information Society*.

Co-Chair, Working Group on “New Regulatory Framework,” The Digital Age Communications Act Project, Progress & Freedom Foundation, 2004-2006.

Board of Advisors, Institute for Regulatory Law & Economics, 2003-present.

Board of Legal Experts, Carnegie Mellon University Insites Program (Law and Technology), 2002-2006.

Admitted to Illinois, Seventh Circuit, and Northern and Central Districts of Illinois Bars. Active membership.

Expert Declaration for AT&T Corp. in Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities, FCC GN Docket 00-185 (Jan. 19, 2001).

United States Court of Appeals for Seventh Circuit. Accepted appointments in civil cases on request of Circuit Executive. Black Lung representation – appointed in 1999, matter concluded (favorably) 2012.

Appellate and complex litigation consulting. Clients (either directly or indirectly through a law firm) have included Citgo Petroleum Corp., Union Carbide Corp., and PacTiv Corp.

### ***TEACHING***

Courses: Administrative Law, Antitrust Law, Business Associations, Intellectual Property, Telecommunications and Internet Policy, and Torts. Corporations (co-listed with Kellogg Business School as Business Law); The Law of Information Technology (Master of Science in Information Technology, McCormick School of Engineering.)

Teaching Awards: Best Teacher of a First-Year Class (1999-2000 and 2007-2008) (student-voted award); Outstanding Teacher of a Small Class (2008-2009 and 2009-2010) (student-voted award)  
Childres Award for Teaching Excellence (2000-2001, 2005-2006, and 2008-2009) (student-voted award for best overall teacher)  
Dean's Teaching Award (2002-2003 and 2005-2006)  
Elected "Last Lecturer" for Graduating Class (2005, 2006, 2011).

PhD Committee at Tilburg University, Dec. 2012 (subject: European Network Neutrality regulation).

### ***SERVICE***

2014-2015: Business Law Appointments Committee

2013-2014: Strategic Planning Committee, Phase II (Curriculum Co-Chair)

2012-2013: Appointments Committee  
Strategic Planning Committee  
Co-Chair, Faculty Development Committee  
Law School Representative, University Faculty Reappointment, Promotion, Tenure, and Dismissal Appeals Panel

2011-2012: Chair, Faculty Advisory Committee (faculty-elected member)  
Co-Chair, Faculty Development Committee  
Dean's Budget Committee  
Law School Representative, University Faculty Reappointment, Promotion, Tenure, and Dismissal Appeals Panel

2010-2011: Chair, Faculty Advisory Committee (faculty-elected member)  
Law School Representative, University Faculty Reappointment, Promotion, Tenure, and Dismissal Appeals Panel

2009-2010: Clerkship Committee  
Curricular and Pedagogical Practices Task Force

2008-2009: Clerkship Committee  
Curricular and Pedagogical Practices Task Force

2007-2008: Co-Chair, University Committee to revise patenting policy  
Dean's Plan 2008 Strategic Planning Committee  
Clerkship Committee

2006-2007: Chair, Curriculum Committee  
Business and Commercial Appointments Subcommittee

2005-2006: Chair, Curriculum Committee  
Member, Intellectual Property Appointments Subcommittee

2003-2004: Chair, Clerkship Committee  
Faculty Advisor, Media & Entertainment Law Society (assisted students  
organizing conference on FCC media ownership rules)

2002-2003: Faculty Advisory Committee (faculty-elected member)  
Law Review Faculty Advisor  
Clerkship Committee

2001-2002: Faculty Advisory Committee (faculty-elected member)  
Law Review Faculty Advisor

2000-2001: Co-chair, Clerkship Committee  
Corporate and Securities Appointments subcommittee  
Entry-level Appointments subcommittee  
Program Committee, Election 2000 Conference  
Northwestern Great Debates, sponsored by Provost's office, Feb. 2001

1999-2000: Appointments Committee  
Chair, Clerkship Committee